IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1779

ROBERT L. CHAZIN

Petitioner,

vs.

CARL WITKOVICH, W. F. OSTRANDER, TWIN PINES FEDERAL SAVINGS AND LOAN ASSOCIATION AND T. D. SERVICE COMPANY

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

ROBERT L. CHAZIN
1760 Solano Avenue, Suite 200
Berkeley, California 94705
Petitioner in Pro Se.

MILTON NASON
GEORGE A. LYDON
1760 Solano Avenue, Suite 200
Berkeley, California 94707
Of Counsel

Printer: Copy-Copia, San Francisco, California Phone (415) 391-0574
Typesetter: Graphitype, Berkeley, California. Phone [415] 526-7151

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Federal

California

Treatises

Law Review Articles

Cases

IN THE

Supreme Court of the United States

October Term, 1976

No. —

ROBERT L. CHAZIN
Petitioner

vs.

CARL WITKOVICH, W. F. OSTRANDER, TWIN PINES FEDERAL SAVINGS AND LOAN ASSOCIATION AND T. D. SERVICE COMPANY

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner, Robert L. Chazin, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*) is unreported. The judgment of the District Court is set forth in App. B, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on December 2, 1976. On February 1, 1976 the Court denied a petition for rehearing and rejected a suggestion for rehearing en banc. This order is set forth in App. C, *infra*. On March 30, 1977

the time for filing a petition for certiorari was extended by Mr. Justice Rehnquist to and including June 13, 1977. Jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether a federal court may accord a state court judgment a greater preclusive effect than it would have in the courts of the rendering state;

2. Whether, under California law, a California declaratory judgment concludes matters neither litigated nor declared;

3. Whether California's non-judicial foreclosure law involves sufficient state-action to require the imposition of the due process and equal protection strictures of the Fourteenth Amendment.;

4. Whether, under the facts of the case, the procedures used to effect the foreclosure and sale of petitioner's home satisfied the due process and equal protection requirements of the Fourteenth Amendment.

Constitutional Provisions and Statutes Involved

The due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States; the Civil Rights Act of 1871, Section 1, 17 Stat, 13, 42 U.S.C. 1983; Act of March 3, 1911 (as amended), 37 Stat. 1901, 28 U.S.C. 1331 (federal question jurisdiction of the district courts); Act of June 25, 1948, 62 Stat, 947, 28 U.S.C. 1738 (full faith and credit to state court judgments); sections 1060, 1062 of the California Code of Civil Procedure, as they existed in 1973 (the California Declaratory Judgment Act); and portions of the California non-judicial foreclosure law, sections 2924, 2924b of the California Civil Code, as they existed in 1973.

These statutes are set forth in Appendix D.

Statement

The facts, which are essentially not in dispute, may be summarized as follows:

Petitioner purchased a home at 2916 Elmwood Court, Berkeley, California on December 1, 1970. The purchase price was financed by respondent Twin Pines Federal Savings & Loan Association ("Twin Pines"). On February 24, 1971, petitioner executed a deed of trust in favor of Twin Pines, a copy of which is contained in Appendix E.[1] This deed of trust, which is on the standard California form, contained a statutory "request for notice," pursuant to section 2924b of the California Civil Code, to the effect that copies of any notices subject to the provisions of that section–i.e. notices relating to default, foreclosure or sale–be sent to 2322 Russell Street, Berkeley, California. This was petitioner's address at the time the deed of trust was executed. The deed contains no warning of the effect of designation of a given address in the request for notice, nor any indication as to what steps a homeowner must use to effect a change of address.

Shortly thereafter, petitioner moved to the Elmwood Court property. The Elmwood Court address, along with some supplementary addresses supplied by petitioner to Twin Pines, and connected with his then employment in Southern California, was used by petitioner and Twin Pines for all correspondence. The Elmwood Court address was petitioner's legal residence for all purposes; petitioner voted in the precinct containing that address and it appeared on his driver's license. Petitioner filed a change of address, directing that mail be forwarded from the Russell Street address to the Elmwood Court address at the time he moved to the latter and, except as set forth in this petition, received no mail at the Russell Street address after he took possession of the Elmwood Court property in the spring of 1971.

On July 18, 1973, more than two years after petitioner moved into the Elmwood Court residence, respondent T. D. Service Company ("T.D."), acting as trustee for respondent Twin Pines, recorded a notice of default on the Elmwood Court property

[1] The deed was contained in the record on appeal, Doc. 19, Ex. "A".

[2] A change of address is effected by executing a new "request for notice," acknowledging it before a notary public and then recording it. California Civil Code, section 2924b.

and mailed it to the *Russell Street* address. By 1973 the change of address order filed with the post office had, of course, expired[3] and petitioner did not learn of the existence or filing of the notice until July 17, 1973, and then only through fortuitous circumstances unconnected with any of the respondents.[4]

Petitioner immediately undertook efforts to arrange to have funds to pay the amounts demanded by respondents, which included substantial trustee's and other fees, sent to him. On September 21, 1973, more than 90 days after the date of filing of the notice of default, but less than 90 days after the date petitioner learned of the impending foreclosure, petitioner made full tender of all amounts previously demanded by respondents, which, petitioner asserted, they were not entitled to because of the manner in which the notice was given. Respondents contended that the reinstatement of the loan at that time was a matter of creditor's grace and declined to reinstate the loan unless further sums were paid.

On September 12, 1973, petitioner commenced an action in the superior court, seeking declaratory relief *only*, which prayed for a declaration that respondents Twin Pines and T. D. were obliged to send a copy of any notice of default to the Elmwood Court address, i.e. the address where petitioner customarily received mail and which was the property which was security for respondent's loan. Petitioner contended that a solitary notice sent to an address at which appellant had not lived or received mail was a nullity, and that respondents were estopped to rely on such notice for compliance with the statutory requirements of section 2924b of the California Civil Code.[5] No

[3] The Court may wish to take judicial notice of regulations of the Post Office, as in force on June 18, 1973, providing that change of address orders expire one year after the filing thereof.

[4] Petitioner was out of town at the time and telephonically requested his bank to prepare a cashier's check and forward it to Twin Pines. When, thereafter, Twin Pines mailed the check back to the bank, the latter notified petitioner of the fact.

[5] California courts have had occasion to consider this sort of situation before. See, e.g., *Lupertino v. Carbahal* (1973) 35 C.A. 2d 742, 111 Cal. Rptr. 112.

damages, or other relief, other than an injunction *pendente lite*, were prayed for. In particular, the complaint did not make any constitutional attack on the relevant California statutes, contrary to the assertion contained in the opinion of the Court of Appeals, set forth herein in Appendix A. The complaint is set forth herein in Appendix F, and is contained in the record before the Court of Appeals at 73.

Petitioner sought and obtained a preliminary injunction, enjoining respondents from proceeding with the foreclosure sale,[6] pending a trial of the action in chief. Thereafter, the action proceeded to a trial to the Court. Respondents contended, as they had at the hearing on the preliminary injunction that they had complied with all applicable California statutes and that that was all they were required to do. Petitioners contended that respondents were estopped to rely on a notice mailed to an address they know to be obsolete.

At the conclusion of the trial, the court rendered judgment in favor of respondents herein and subsequently, judgment was entered in favor of respondents and the preliminary injunction dissolved. Petitioner attempted to stay the foreclosure sale and filed an undertaking on appeal in an amount fixed by the Court, $10.000.00. Respondents took the position that the judgment was self-executing and noticed a foreclosure sale for November 8, 1974.

One November 7, 1974, and acting on instructions from counsel George A. Lydon,[7] who had represented petitioner in the superior court litigation, and who was in Los Angeles on that date, petitioner prepared and filed a *pro se* complaint and filed it in the district court. The district court issued an order to show cause (re preliminary injunction) but declined to issue a

[6] In California parlance these sales are referred to as "trustee's sales." See discussion of the California non-judicial foreclosure law, *infra* p. 12.

[7] Petitioner is at present a first-year law student and had acted as Lydon's law clerk for several years prior. Lydon contracted cancer of the vocal chords and is at present unable to speak. For that reason he is of counsel hereon rather than attorney of record. Should certiorari be granted, petitioner will provide counsel for oral argument.

temporary restraining order. Accordingly, the foreclosure sale took place on November 8, 1974.

The federal complaint alleged jurisdiction under 28 U.S.C. 1331 and 42 U.S.C. 1983. It attacked the foreclosure statute as unconstitutional as applied to petitioner. Petitioner moved the Court for a preliminary injunction setting the sale aside; this was denied.[8] Thereafter, the Court granted summary judgment in favor of respondents, holding that the prior state court judgment was res judicata. The Court also remarked that, in its view, California's non-judicial foreclosure law did not involve sufficient state action to subject it to constitutional strictures of due process. For the latter proposition, the District Court relied *inter alia* on *Adams v. Southern California First National Bank* 492 F. 2d. 324, (9 cir., 1975), which had just been decided.

Petitioner filed a timely notice of appeal. Petitioner's opening brief was confined to the question of res judicata. Petitioner contended that the Court of Appeals was required by the statutory analog of the full faith and credit clause, 28 U.S.C. 1738, to apply state law to determine the preclusive effect of the prior California judgment; that under that law, the prior California judgment, a declaratory judgment obtained pursuant to sections 1060 *et. seq.*, concluded only matters actually litigated and did not operate, via the doctrine of res judicata, to bar further litigation in state of federal courts of constitutional (or, for that matter, other) questions not actually litigated in the prior state court action. Further, petitioner argued that the foreclosure sale and recording of the notice of default constituted *two* causes of action under California law, not one, so that the prior state court judgment functioned only by way of collateral estoppel. Petitioner did not raise the question of state action in his opening brief but suggested that the judgment be reversed on the res judicata question alone, possibly with directions to the district court to abstain while the question of the res judicata effect of a California declaratory judgment was litigated in state court in accordance with the principles announced by the Ninth Circuit in *Garfinkle v. Wells Fargo Bank* (9 cir., 1973) 483 F. 2d.

[8] Petitioner retained counsel for the action in the district court.

1074 and by this Court in *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964).

Respondents contended that a California declaratory judgment had the same preclusive effect as any other California judgment. They also contended that, even if not barred by reason of the prior state court judgment, appellant's section 1983 action would have to be dismissed on state action grounds.[9] Petitioner's reply brief accordingly responded at length to this assertion.[10]

A panel of the Court of Appeals affirmed the judgment of the District Court on December 2, 1976. A timely petition for rehearing and a suggestion of appropriateness of rehearing *en banc* was denied on February 1, 1977. Pending the disposition of this petition, the mandate of the Court of Appeals has been stayed pursuant to motion.[11]

[9] Respondents did not address themselves to the fact that the federal complaint also invoked jurisdiction under 28 U.S.C. 1331.

[10] Petitioner's reply brief was out of time and oversize. A motion for leave to file it was denied; accordingly, that brief is "lodged" rather than "filed".

[11] The effect of the order staying the issuance of the mandate of the Court of Appeals is to continue the vitality of a notice of lis pendens recorded at the time the action in the district court was filed. The purchaser at the trustee's sale, who is the party affected thereby, has indicated that it did not object to the sale being set aside if it received a refund of its purchase price and interest. (R., 60)

REASONS FOR GRANTING THE WRIT

There are two reasons for granting the writ in this case:

(1) A decision of a Court of Appeals which decides a controlling question of state law in a manner in conflict with applicable state statutory and decisional law so as to deprive a litigant of an important federally conferred right should be reversed;

(2) This Court has never reviewed, from the standpoint of state action considerations and due process, any of the various state non-judicial foreclosure laws, which generate a great deal of litigation; and the impact of the *Sniadach* progeny on these procedures should be elucidated.

I

Certiorari Should Be Granted to Reverse A Judgment of a Court of Appeals Which Decides a Controlling Question of State Law in a Manner Conflicting with Applicable State Statutory and Decisional Law so as to Deprive a Litigant of a Federally Conferred Right.

The case at bench presents the familiar question of the res judicata effect of a prior state court judgment in a subsequent section 1983 federal action. The question has been before this Court many times[12]; it has been the subject of conflicting decisions of the Court of Appeals[13]; of law review articles[14]; and it is presently the subject of a bill in the current Congress.[15]

In the case at bar, the question appears in an unusal context. Petitoner contends, as he did before the Court of Appeals, that federal courts must apply *state* law to determine the preclusive effects of a prior state court judgment; and that under applicable

[12] See e.g. *Huffman v. Pursue, Ltd.* 420 U.S. 592, 606 n. 18 (1975), the Court expressly declining to decide the question.

[13] See e.g. *Lombard v. Board of Education* 502 F. 2d. 631 (2d. cir., (1974), holding that constitutional issues not litigated in a prior state court action may be litigated in a subsequent section 1983 proceeding; and *Scoggin v. Schrunk*, 522 F. 2d. 436 (9th cir., 1975) holding precisely the contrary.

[14] See e.g., Bartels, Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that "interfere" with State Civil Proceedings, 29 Stanf. L. R. 27; A. Vestal, State Court Judgment as Preclusive in Section 1983 Litigation in Federal Court, 27 Okl. Law. R. 185 (1974).

[15] Senate Bill 35, 95th Congress.

state law, the prior California declaratory judgment was dispositive only of issues actually litigated.

Petitioner urges that in affirming the dismissal of his section 1983 action, the Court of Appeals ignored a long line of decisions of this Court which require a federal court to apply state law to determine the preclusive effect of a state court judgment, and also overruled, *pro tanto* prior decisions of the Court of Appeals itself to the same effect. Petitioner urges that where, as here, state law limits the preclusive effect of a particular judgment obtained under the law of the state to issues actually litigated therein, a federal court may not thereafter confer a *greater* preclusive effect on such judgment.

State Law Controls the Construction of a State Court Judgment in a Federal Court

It is well settled that state law governs the preclusive effect to be given a state court judgment in federal court; *Union & Planter's Bank v. Memphis*, 189 U.S. 71 (1903) and it is equally well settled that a federal court may not accord a prior state court judgment a *greater* preclusive effect than it had under the law of the rendering state.[16] *People of the State of New York ex rel Halvey v. Halvey* 330 U.S. 610 (1947). To similar effect are numerous decisions of the Court of Appeals for the Ninth Circuit itself. See *Neale v. Goldberg*, 525 F. 3d. 332 (9th cir., 1975); *Nev.-Cal. Electric Secur. Co. v. Imperial Irrigation District*, 85 F. 2d. 886 (9th cir., 1936), *cert. den.* 300 U.S. 662. The decision of the Court of Appeals in the case at bar is thus contrary to the great weight of authority.

No Litigation of Constitutional Questions in the Superior Court

Contrary to the assertion made in the opinion of the Court of Appeals (App. A) there was no litigation of constitutional questions in the Superior Court, as is clear by inspection of the complaint in that action (App. F). To the extent that the judgment of the Court of Appeals depends on this assertion, it should be reversed on grounds of plain error.

[16] There are, however, decisions holding that a federal court may accord such a judgment a *lesser* preclusive effect. *Lombard, supra*, p. 8, fn. 13.

A California Declaratory Judgment Concludes Only Issues Actually Litigated and Declared

Petitioner urges that a California declaratory judgment, obtained pursuant to section 1060 *et. seq.* of the California Code of Civil Procedure, concludes only issues necessarily litigated and actually declared, and does *not* conclude issues which were not so litigated. Such declaratory judgments are thus *exceptions* to the usual rule of the doctrine of res judicata that a judgment concludes not only matters actually adjudicated, but also, with respect to the same cause of action, matters which could have been litigated but were not.

Though there is ample authority for this proposition from other states,[17] in both Restatements of Judgments [18]; in the treatise of the leading commentator on California law [19], in the declaratory judgment act itself [20], in various annotations and treatises [21], the California appellate courts have never considered the precise question. The Court of Appeals was thus confronted by a question of state law which would have been of first impression had it been decided by the California courts.[22]

[17] See *Cooke v. Gaidry* 218 S.W. 960 (Ky., 1949), *North Shore Realty Corp. v. Gallaher* 99 So. 2d. 255 (Fla. App. 1957); *In re Ditz' Estate*, 124 N.W. 2d. 814 (Ia., 1964) and most recently, *Atchison v. City of Inglewood* 506 P. 2d. 140 (Colo. 1973), all construing various versions of the Uniform Declaratory Judgment Act. This section, set out in App. E, is considerably more restrictive than the corresponding section of the California Declaratory Judgment Act, section 1062 of the California Code of Civil Procedure (App. D).

[18] Restatement of Judgments 1st, sec. 77 and comment b thereof; Restatement of Judgments 2d, sec. 76, Tent. Draft No. 1 (1973). See App. G.

[19] 4 Witkin, *California Procedure*, Judgments §172 ("[a declaratory judgment] should be binding as to matters declared, *though it is not a merger or bar*.") (emphasis added).

[20] Section 1062, California Code of Civil Procedure. (App. D).

[21] 10 A. L. R. 2d. 782, particularly par. 3; 22 Am. Jur. 2d. sec. 102.

[22] Implicit recognition of the proposition appears as dicta in *Neale v. Goldberg, supra*, fn. 17, but the court was able to dispose of that case on other grounds not applicable here (the cause of action in the prior state court suit was 'fully matured".)

Nevertheless, all decisions of the California intermediate appellate courts which have considered the question of the res judicata effect of a California judgment are consistent with petitioner's position and inconsistent with respondents' view, which (as stated in their brief before the Court of Appeals) is that a California declaratory judgment is indistinguishable for res judicata purposes from any other California judgment.[22.5] *Lortz v. Connell*, 273 Cal. App. 2d. 286, 78 Cal. Rptr. 6 (1969) (declaratory judgment does not preclude prevailing party from seeking damages in subsequent action); *Giese v. City of Los Angeles*, 77 Cal. App. 2d 1029, 175 P. 2d. 562 (1946). (actions for declaratory relief exception to general rule that party must litigate all claims arising from a single transaction in one action or they will be lost by merger or bar.

The Judgment of the District Court Should Have Been Reversed or Reversed with Directions to Abstain

The Court of Appeals, engrafting onto California's declaratory judgment act a new requirement, not enacted by the legislature, that a litigant availing himself of its provisions must raise all issues in an action therefor, affirmed the judgment of the District Court which accepted responents' defense of res judicata. Petitioner urges that this decision, stemming from an erroneous determination of a controlling question of California law should have been reversed. Not only does the decision of the Court of Appeals preclude relief for petitioner in the federal courts, it also precludes relief (via the doctrine of the law of the case) in *state* courts as well.

While it is well settled that under certain circumstances a federal court may of necessity decide questions of state law, a federal court must decide such questions in the manner in which such questions would be decided by the highest court of the state; where state law controls, the federal court must apply it " . . . rather than . . . prescribe a different rule, however superior it may appear to be . . . ." *West v. American Tel. & Tel. Co.* 311 U.S. 223, 236–237. (1940). Considerations of judicial

[22.5] Contrary to the opinion of the Court of Appeals, *Dills v. Delira* does *not* support respondents' position. Dills does not deal with the question of res judicata at all.

efficiency and economy, the proliferation of litigation–especially section 1983 litigation–and similar policy considerations are important and may furnish, at least to some extent, a rationale for a strict application of the doctrine of res judicata in those situations where an unsuccessful state court litigant seeks relief in a subsequent federal action.[23] Such considerations, however, cannot justify an intrusion by the federal judiciary into an area which properly belongs to the California legislature. The res judicata effect of a California judgment in the California courts is solely within the province of the California legislature and courts; and petitioner urges that federal courts are constrained to adhere to that law.

II

Certiorari Should Be Granted to Determine Whether or Not California's Non-Judicial Foreclosure Law Involves Sufficient State Action to Subject It to Constitutional Strictures of Due Process and Equal Protection.

Commencing in 1969 with *Sniadach v. Family Finance Co.*, 395 U.S. 337, this Court has reviewed a number of creditor's remedies and determined whether or not they pass constitutional muster. To date, however, the Court has never decided a case involving a "non-judicial foreclosure statute"–i.e. foreclosure under a deed of trust containing a power of sale.

The economic and social importance of this particular creditor's remedy can scarcely be overstated. The question of whether California's non-judicial foreclosure law involves a sufficient quantum of state action to trigger the imposition of constitutional safeguards of due process and equal protection and, if it does, whether the law as enacted and applied is constitutionally adequate, has never been considered by either the California Supreme Court or by the Ninth Circuit.[24] Elsewhere, comparable

[23] Indeed, senate bill 35, *supra* p. 8, fn. 15, drastically restricts the use of res judicata as a defense to section 1983 actions.

[24] The statute has been considered by a federal district court and a California intermediate appellate court; state action has been found lacking. See *Lawson v. Smith* 402 F. Supp. 851 (N.D. Cal., 1975); *Strutt v. Ontario Savings & Loan*, 11 Cal. App. 3d. 547, 90 Cal. Rptr. 69 (1970).

–but distinguishable–non-judicial foreclosure statutes have been considered by federal courts in the District of Columbia, Texas, Michigan, North Carloina and most recently, Arizona. Two district court decisions have found state action present in the foreclosure statutes of Michigan and North Carolina[25] while it has been found to be absent in the foreclosure statutes of Michigan, District of Columbia Texas, and Arizona.[26]

Petitioner urges that the question of whether or not California's statutory scheme involves sufficient state action to require the imposition of constitutional safeguards is of great public importance and is deserving of consideration by this Court.

Indicia of State Action

While this petition is not the appropriate place for a detailed analysis of this question, some of the factors which lead to a conclusion that the California statute does indeed involve the requisite quantum of state action to subject it to subject it to constitutional provisions of the Fourteenth Amendment may be summarized as follows:

1. Expansion of the creditor's remedy beyond the limits existing under the common law. The present statutory scheme expands the remedy of non-judicial foreclosure by giving the creditor several rights he did not possess at common law. Some, but not all, of these are set forth in paragraphs 3, 4, and 6, *infra*. Such expansion is "not the final answer to the touchstone of state action," *Adams v. Southern California First National Bank*, 492 F. 2d. 324 (9th cir., 1973) but it is an important factor to be considered. See, e.g., *Culbertson v. Leland*, 528 F. 426 (9th cir., 1975); *Parks v. "Mr. Ford"*, - F. 2d. - , 45 U.S. L. W. 2500 (3rd cir., 1977).

[25] *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975); *Garner v. Tri-State Investment Co.* 382 F. Supp. 377 (E.D. Mich. 1974).

[26] *Northrip v. F.N.M.A.* 527 F. 2d. 23 (6th cir., 1975); *Bryant v. Jefferson savings & Loan* 509 F. 2d. 511 (D.C. Cir., 1974); *Barrera v. Security Building & Investment Coop.* (5th cir., 1975), *Kenly v. Miracle Properties, Inc.* 412 F. Supp. 1072 (D. Ariz., 1976).

2. Pervasiveness of state regulation. The California statute completely defines and delimits the procedures to be used in a non-judicial foreclosure and to a far greater extent than any of the statutes in jurisdictions whose statutes were found not to involve state action. This alone, without more has been held insufficient to support a finding of state action, cf. *Jackson v. Metropolitan Edison Co.* 419 U.S. 345, but it too, is a factor to be considered. Of particular importance in the instant case are the notice provisions of the statute, contained in section 2924b of the California Code of Civil Procedure. Petitioner urges that the requirement that a change of address notice be executed, acknowledged and recorded before it is effective, and denying any effect to a simple letter, is state action *per se*.

3. Deprivation of property rights without notice or hearing. The California non-judicial foreclosure procedure is initiated when the "trustee" executes and records a "Notice of Default and Election To Sell." The mere recording of such a notice deprives the homeowner of marketable title and operates to prevent him from conveying or encumbering the property. The notice itself contains the creditor's statement of the amount due, even if such amounts are in dispute; and typically, the filing of such a notice will ultimately result in the homeowner being required to pay additional fees. The creditor posts no bond, files no affidavit or declaration whatever to obtain this remedy. Petitioner urges that this procedure involves the delegation by the state to private individuals, here the power to adjudicate disputes (here, disputes over the amount due the creditor) and of the courts and the sheriff to attach property, inasmuch as the recording of the notice of default has virtually the same effect on title to the property as a formal writ of attachment would have. Such delegation converts the acts of a private individual–the trustee–into acts of the state itself.

4. Seizure of property unrelated to debt. The purchaser at a trustee's sale is entitled to evict the former owners (or those holding under them) by statutory unlawful detainer, section 1161 (a) (3) of the California Code of Civil Procedure. When

the eviction takes place, the purchaser (or his successor in interest) acquires a lien for "storage charges" on all personalty left on the premises. California Code of Civil Procedure, section 1174(d). This lien is wholly statutory and did not exist at common law in California. *Hitchcock v. Hassett* 71 Cal. 331, 12 P. 228 (1886). California courts have held that, absent the statute, the trustee's sale purchaser would be left to his common law remedy of ejectment. *Greene v. Municipal Court*, 51 Cal. App. 3d. 446, 124 Cal. Rptr. 139. That remedy, of course, requires the trustee's sale purchaser to prove his title and does *not* give him a lien on the trustor's personalty following an eviction.

5. Perhaps the most compelling indication that the requisite state action is present in the California statute are the provisions of section 2924 of the California Civil Code, providing that a recital in the trustee's deed that the relevant requirements of law respecting recording and mailing of the various notices required are prima facie evidence thereof and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice. This Court has held that such conclusive evidentiary presumptions violate the due process clause of the Fourteenth Amendment. *Western & A.R.R. Co. v. Henderson*, 279 U.S. 639. (1929). Like Professor Hetland,[27] petitioner believes that only the state can "enact and enforce a policy precluding litigation over fact questions by ordering them to be true when they are false."

It should be noted that although the foreclosure statutes in some of the other states considered in *Barrera, Bryant, Northrip, Turner* and *Kenly, supra*, p. 13, fn. 25, 26, contain provisions making the trustee's deed *presumptive* evidence of compliance with the notice provisions, only California and Arizona have such provisions.

[27] J. Hetland, *Secured Real Estate Transactions*, California Continuing Education of the Bar, 1974. Chapter 8 contains a lengthy discussion of the California non-judicial foreclosure statute and a critique thereof.

6. Finally, the state imposes *criminal* sanctions on a trustee's sale bidder who fails to deliver the amount of his bid; section 2924b of the California Civil Code makes such failure a misdemeanor.

It is often argued that creditor's remedies which arise from a contract between two parties are private and that state legislation regulating such remedies does not convert them from private action to state action. A notable example of this argument can be found in the automobile repossession cases, e.g. *Adams, supra; Turner v. Impala Motors*, 503 F. 2d. 607 (6th cir., 1974). This argument is inapplicable to the case at bar, as is clear when one considers what the situation would be if no statute existed: the lender would then stand in the position of any other creditor and be obliged to establish his debt judicially.

Petitioner urges that the California statute clearly reveals a "... sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Jackson, supra.*

California's Non-judicial Foreclosure Law Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment

The most serious difficulty with the notice provisions of the California statute is that the trustee is not required to do anything to assure that the trustor will receive actual notice; compliance with the statute is sufficient, and the statute only requires that notice be sent to the address given in the deed of trust or subsequent request for notice. This is true even if that address is known by the trustee to be obsolete, and the trustee has actual notice of the true address; or if the notice is returned as undeliverable. *McClatchey v. Rudd*, 239 C.A. 2d. 605 (1966); *Strutt v. Ontario Saving & Loan* 28 C.A. 3d. 866; 105 Cal. Rptr. 395; *Strutt, supra*, p. 12, fn. 24. There is nothing in the standard California trust deed—or indeed, in the deed in the case at bar to warn the trustor of the importance of, or procedure for

changing, the address to which foreclosure notices are to be sent.[28] Parenthetically, it should be noted that the "trustee" who conducts the foreclosure sale, usually a title company or organization engaged solely in that business, is not a trustee in the usual sense of the word. Under California law, his status is merely that of an agent for the lender, obliged to carry out his directions. See, e.g. *Fleisher v. Continental Auxiliary Co.* 215 Cal. App. 2d. 136, 30 Cal. Rptr. 137 (1963); section 2934a of the California Civil Code.

It is thus quite clear that the notice procedure authorized by California law falls far short of the standard set forth by this Court in *Mullane v. Central Hanover Bank*, 337 U.S. 306 (1950). Absent statutory authorization to send only one notice to a particular address, whether current or not, trustees might well exert greater efforts to insure that trustors received actual notice. There have been egregious cases in which trustees sent the required notices to addresses they knew to be obsolete so that the trustor did not learn of the impending foreclosure sale until the 90 day redemption period had expired. See e.g., *Lupertino v. Carbahal*, 35 Cal. App. 2d. 742, 111 Cal. Rptr. 112. None of these cases have considered the constitutional questions involved, however.

Quite aside from the notice question presented by this case, there are serious due process deficiencies in California's non-judicial foreclosure law. See, e.g., Hetland, supra, section 8.5. The statute has enormous potential for injustice and abuse and the reports are replete with many examples thereof. See, e.g., *Bisno v. Sax*, 175 Cal. App. 2d. 714, 346 P. 2d. 816 (1959); *Gonzales v. Gem Properties, Inc.* 37 Cal. App. 2d. 1029; 112 Cal. Rptr. 904 (1974); *Lupertino, supra*. If the Court finds the requisite state action to be present in the California statute, the way will be open for some of these abuses to be corrected.

Petitioner's Notice: Equal Protection

As noted by the Court of Appeals in its opinion (App. A) petitioner had actual notice (though fortuitiously, and by

[28] Pursuant to Supreme Court Rule 21(1) the clerk of the Court of Appeals is requested to transmit a copy of the deed to the Court prior to docketing the instant petition.

means unrelated to respondents) of the impending foreclosure partway through the 90 day redemption period. The Court of Appeals held that ". . . this finding cannot be relitigated and is in itself ground for dismissing the complaint."

Petitioner respectfully disagrees. The fact that petitioner had actual notice partway through the 90 day redemption period was never in dispute. Petitioner submits, however, that the fact does not require dismissal of the complaint, for if the state has enacted a statute giving trustors 90 days to cure any alleged default, a statute which operates in a fashion to give some persons against whom it is applied less than 90 days notice of an impending foreclosure–or indeed, as in *Lupertino*, notice after the period had expired altogether–is a clear denial of equal protection.

Because of acceleration provisions in deeds of trust, trustees' fees and other related costs, a trustor who seeks to cure a default will typically have to pay a substantial amount of money. Presumably the legislature determined that 90 days was a sufficient period for a trustor to obtain the requisite funds. In the case at bar, petitioner made tender of all sums previously demanded by respondents more than 90 days from the filing of the notice of default but less than 90 days from petitioner's receipt of actual notice. If the statute is applied in such a way as to give some trustors less than 90 days' notice, petitioner urges that it is unconstitutional as applied and denies those persons the equal protection of the laws, in contravention of the Fourteenth Amendment.

Conclusion

For the reasons hereinabove set forth, we pray that the writ be granted.

Respectfully submitted,
ROBERT L. CHAZIN
1760 Solano Avenue, Suite 200
Berkeley, California 94705
Petitioner in Pro Se.

MILTON NASON
GEORGE A. LYDON
1760 Solano Avenue, Suite 200
Berkeley, California 94707
Of Counsel.

APPENDIX A*

United States Court of Appeals
for the Ninth Circuit

No. 75–1753, December 2, 1976

ROBERT L. CHAZIN

v.

CARL WITKOVICH, W. F. OSTRANDER, TWIN PINES FEDERAL SAVINGS AND LOAN ASSOCIATION; T. D. SERVICE COMPANY, and DOES I-IV

Appeal from the United States District Court for the Northern District of California

Sneed and Kennedy, Circuit Judges.
Richey, District Judge.

Plaintiff brought this action in the United States District Court for the Northern District of California under 42 U.S.C. section 1983. The district court ruled that the action was barred by the doctrine of res judicata. We affirm.

Before filing the complaint in the instant suit, plaintiff brought an action for declaratory relief in state court to prevent foreclosure on his property. In that action, he alleged that the notice provisions of California Civil Code section 2924b were inadequate. After making specific findings of fact, the state trial court rendered judgment against Chazin. The state appellate courts affirmed, and the judgment is now final.

Plaintiff s federal action is nearly identical to the state action: the parties involved, the facts alleged, and the law challenged are all similar. In the federal suit he claims that because of deficiencies in the statutory notice provisions, the state foreclosure proceedings violated his constitutional rights. Claims that could have been raised in an earlier state proceeding are barred by the doctrine of res judicata. Scoggin v. Schrunk, 522 F.2d

* Summary affirmance reported at 547 F. 2d. 1174.

436, 437, (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976). This rule applies to actions brought under 42 U.S.C. section 1983. *Id.* at 437. Moreover, res judicata principles apply even though plaintiff sought declaratory relief in his state action. *See* Dills v. Delira Corp., 145 Cal. App. 2d 124, 302 P.2d 397, 401 (1956); *cf.* Lortz v. Connell, 273 Cal. App. 2d 286, 301, 78 Cal. Rptr 6 (1969).

Finally, we note that the state trial court specifically found that as early as July 17, 1973, plaintiff had actual notice that his loan was in default and that forclosure proceedings under the deed of trust had been commenced. Although he had the opportunity to tender a sum to reinstate the loan, he failed to do so within the statutory period. This factual finding cannot be relitigated and is in itself ground for dismissing the complaint.

Affirmed.

APPENDIX B

United States District Court for the
Northern District of California

No. C–74–2364 RHS. January 27, 1975

ROBERT L. CHAZIN

v.

CARL WITKOVICH, W. F. OSTRANDER, TWIN PINES FEDERAL SAVINGS AND LOAN ASSOCIATION, T. D. SERVICE COMPANY, and DOES I through IV.

Plaintiff's motion for leave to file an amended complaint is hereby granted. Plaintiff's motion for preliminary injunction and defendants' motion for summary judgment and the briefs and other documents related thereto will be deemed applicable to the amended complaint.

The amended complaint, brought under 42 U.S.C. §1983, seeks: (1) a declaration that Cal. Civ. Code §2924b violates the Fourteenth Amendment's due process clause by authorizing the forclosure sale of realty under a deed of trust without actual notice to the trustor, though actual notice could be given; (2) a declaration that as a result of the due process violation, the foreclosure sale of plaintiff's realty is void, and (3) associated relief, including special and general damages. However, since plaintiff could have raised his due process contentions in a prior state-court action dealing with the then-threatened foreclosure of his realty, and that action has proceeded to judgment, *res judicata* precludes him from raising these contentions here [*Francisco Enterprises, Inc. v. Kirby*, 482 F.2d 481, 485, 485n (9th Cir. 1973)].

At any rate, the requisite state action* was lacking in the transactions at issue, which had no significant state involvement, but involved only private parties and a basically private remedy, albeit one put in a statute [see *Adams v. Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973), *appeal pending* (finding no state action in self-help repossession procedures authorized by Cal. Comm. Code §§9503, 9504)].

Therefore, the motion for summary judgment is granted, and the motion for preliminary injunction is denied.

(s) ROBERT H. SCHNACKE
U.S. District Judge

Judgment

In accordance with the accompanying order,

IT IS ADJUDGED that the complaints and action are dismissed, without further leave to amend.

(s) ROBERT H. SCHNACKE
U. S. District Judge

* Of course, the due process clause of the 14th Amendment is violated only by state action, not by private action.

APPENDIX C

United States Court of Appeals
for the Ninth Court

No. 75–1753, February 1, 1977

ROBERT L.CHAZIN

v.

CARL WITKOVICH, W. F. OSTRANDER, TWIN PINES FEDERAL SAVINGS AND LOAN ASSOCIATION; T. D. SERVICE COMPANY, and DOES I - IV

Appeal from the United States District Court
for the Northern District of California

Sneed and Kennedy, Circuit Judges, and
Richey, District Judge.

The panel as constituted in the above case has voted to deny the petitition for rehearing. Judges Sneed and Kennedy have voted to reject the suggestion for a rehearing en banc, and Judge Richey has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for a rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

California Civil Code*

Section 2924.

Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which such mortgage or transfer is a security, such power shall not be exercised except where such mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until (a) the trustee, mortgagee, or beneficiary, shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default, identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded or a description of the mortgaged or trust property and containing a statement that a breach of the obligation for which such mortgage or transfer in trust is security has occurred, and setting forth the nature of such breach and of his election to sell or cause to be sold such property to satisfy the obligation; (b) not less than three months shall thereafter

*All statutes in Appendix D are given as in force June 18, 1973.

elapse; and (c) after the lapse of the three months the mortgagee, trustee or other person authorized to make the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that set forth in Section 2924f. A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices for which requests have been recorded or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with such requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

Section 2924b.

Request; recording; contents; form. Any person desiring a copy of any notice of default and of any notice of sale under any deed of trust or mortgage with power of sale upon real property, as to which deed of trust or mortgage the power of sale cannot be exercised until such notices are given for the time and in the manner provided in Section 2924 may, at any time subsequent to recordation of such deed of trust or mortgage and prior to recordation of notice of default thereunder, cause to be filed for record in the office of the recorder of any county in which any part or parcel of the real property is situated, a duly acknowledged request for a copy of any such notice of default and of sale. This request shall be signed and acknowledged by the person making the request, specifying the name and address of the person to whom the notice is to be mailed, shall identify the deed of trust or mortgage by stating the names of the parties thereto, the date of recordation thereof and the book and page where the same is recorded or the recorder's number and shall be in substantially the following form:

"In accordance with Section 2924b, Civil Code, request is hereby made that a copy of any notice of default and a copy of

any notice of sale under the deed of trust (or mortgage) recorded . . . . . , 19 . . ., in Book . . . . . page . . . . . records of . . . . . County, (or filed for record with recorder's serial number . . . . , ... County) California, executed by . . . . . as trustor (or mortgagor) in which . . . . . , is named as beneficiary (or mortgagee) and . . . . . as trustee be mailed to . . . . . at . . . . .

Name Address Signature . . . . . "

Recorder's duties. Uopn the filing for record of such request, the recorder shall index in the general index of grantors the names of the trustors (or mortgagor) recited therein and the names of persons requesting copies.

Mailing notice. The mortgagee, trustee or other person authorized to record the notice of default, shall within 10 days following recordation of such notice of default deposit or cause to be deposited in the United States mail an envelope, registered and with postage prepaid, containing a copy of such notice with the recording date shown thereon, addressed to each person whose name and address are set forth in a duly recorded request therefor, directed to the address designated in said request, and at least 20 days before date of sale the mortgagee, trustee or other person authorized to make the sale shall deposit or cause to be deposited in the United States mail an envelope, registered and with postage prepaid, containing a copy of the notice of the time and place of sale, addressed to each person whose name and address are set forth in a request therefor recorded, within the time herein provided.

Request in instrument; publication; service. Any deed of trust or mortgage with power of sale hereafter executed upon real property may contain a request that a copy of any notice of default and a copy of any notice of sale thereunder shall be mailed to any person a party thereto at the address of such person given therein, and a copy of any notice of default and of any notice of sale shall be mailed to each such person at the same time and in the same manner required as though a separate request therefor had been filed by each of such persons as herein

authorized. If any deed of trust or mortgage with power of sale executed after September 19, 1939, except a deed of trust or mortgage of any of the classes excepted from the provisions of Section 2924 does not contain a request of the trustor or mortgagor for special notice at the address of such person given therein or does contain such request but no address of such person is given therein and if no request for special notice by such trustor or mortgagor in substantially the form set forth in this section has subsequently been recorded, a copy of the notice of default shall be published once a week for a least four weeks in a newspaper of general circulation in the county in which the property is situated, such publication to commence within 10 days after the filing of the notice of default. In lieu of such publication a copy of the notice of default may be delivered personally to the trustor or mortgagor within such 10 days or at any time before publication is completed.

Effect of request upon title or as notice. No request for copy of any notice filed for record pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property or be deemed notice to any person that any person requesting copies of notice has or claims any right, title or interest, in, or lien or charge upon the property described in the deed of trust or mortgage referred to therein.

California Code of Civil Procedure

Section 1060. [Declaratory relief]

Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in ,over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action in the superior court or file a cross-

complaint in a pending action in the superior or municipal court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a delcaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

Section 1062. [Other remedies not affected]

The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preculde any party from obtaining additional relief based upon the same facts.

APPENDIX E

Uniform Declaratory Judgments Act

Section 8.

Supplemental Relief. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

APPENDIX F

Superior Court of the State of California
for the County of Alameda

No. 440595, September 17, 1973

ROBERT L. CHAZIN

vs.

TWIN PINES FEDERAL SAVINGS AND LOAN ASSOCIATION, A CALIFORNIA CORPORATION, WILLIAM OSTRANDER, DOES I, II, III, IV

Complaint for Declaratory Relief

Plaintiff alleges:

I

Defendent Twin Pines Federal Savings and Loan Association (hereinafter Twin Pines) and Defendant T D Corporation are California Corporations organized and doing business in California pursuant to the laws of the State of California.

II

Defendants Twin Pines and T D Corporation are residents of the County of Alameda, State of California, and were such at all times mentioned herein.

III

Plaintiff is informed and believes and thereon alleges that defendants William Ostrander and Does I and II are the agents, servants and employees of defendant Twin Pines, and were acting within the scope of their agency and employment at all times mentioned herein.

IV

Plaintiff is informed and believes and thereon alleges that defendants Doe III and Doe IV are the agents, servants and employees of defendant T D Corporation, and were acting

within the scope of their agency and employment at all times mentioned herein.

V

On or about February 24, 1971 defendant Twin Pines, as beneficiary, and Plaintiff as Trustor, made and entered into a first Deed of Trust, evidenced by a written instrument, a copy of which is attached hereto, marked Exhibit "A", and incorporated herein by reference as though fully set forth. On or about March 3, 1971, said first deed of trust was recorded in the office of the County Recorder of the County of Alameda, State of California.

VI

On or about March 3, 1971, Plaintiff recorded a Request for Notice of Default and Notice of Sale under the Deed of Trust with the Office of the County Recorder of the County of Alameda, State of California. Said Request specified Plaintiff's mailing address to be 2322 Russell Street, Berkeley, California.

VII

On or about December 1, 1970, Eleanor B. Lamson, as grantor granted certain real property in the City of Berkeley to Robert Chazin as grantee, said property being the subject matter of the first deed of trust described and referred to in paragraph V above. Said grant deed was recorded by Plaintiff on March 3, 1971 at the Office of the County Recorder, County of Alameda, State of California. Said Grant deed specified plaintiff's address as 2916 Elmwood Court, Berkeley, California, 94705. A copy of said Grant Deed is attached hereto, marked Exhibit "B", and incorporated herein by reference as though fully set forth.

VIII

At all times since February 24, 1971, Plaintiff's actual address has been and is 2916 Elmwood Court, Berkeley, California 94705.

IX

At all times since February 24, 1971, defendants, and each of them had actual knowledge that plaintiff's true and actual address was and is 2916 Elmwood Court, Berkeley, California 94705.

X

Plaintiff is informed and believes and thereon alleges that from and since March 31, 1971, all mail and other correspondence, of every type whatsoever sent by defendants to Plaintiff has been sent to Plaintiff at his true and actual address, to wit: 2916 Elmwood Court, Berkeley, California 94705. The actual number of letters and other correspondence so sent by defendants is not known to Plaintiff at this time and Plaintiff prays leave of Court to amend this complaint, or any amendment thereof, when the same has been ascertained. Plaintiff is informed and believes and thereon alleges that said number of letters is in excess of one dozen.

XI

On or about June 18, 1973, defendants, and each of them caused a notice of default to be mailed to Plaintiff at 2322 Russell Street, Berkeley, California. In so doing, defendants were acting as the agents and servants of each other and were acting within the scope of their agency and employment.

XII

On June 18, 1973, Plaintiff did not and at no time thereafter, did Plaintiff reside at 2322 Russell Street, Berkeley, California, nor did Plaintiff receive mail at said address.

XIII

Plaintiff never actually received written notice of default.

XIV

An actual controversy has arisen and now extists between Plaintiff and Defendants concerning their respective right and duties in that Plaintiff contends that, once having actual knowledge of Plaintiff's true mailing address, and having addressed numerous letters and other communications to Plaintiff at his true address, Defendants should have mailed their Notice of Default to Plaintiff at the true address known to them to be the address where Plaintiff would actually receive such notice. Defendants claim that they need only mail notices to the address specified in Plaintiff's recorded request for notice.

XV

Plaintiff is informed and believes and thereon alleges, that defendants, and each of them knew at all times mentioned herein, that Plaintiff would not receive notice of default mailed by them to any other address but 2916 Elmwood Court, Berkeley, California 94705.

XVI

Plaintiff desires a judicial determination of his rights and duties, and a declaration as to which of the parties herein is correct regarding the mutual rights and responsibilities of the parties herein.

XVII

Such a declaration is necessary and appropriate in order that Plaintiff may ascertain his rights and duties, and because defendants' right of foreclosure will be perfected on September 12, 1973, in which case Plaintiff will lose his statutory right to cure his default.

XVIII

Wherefore, Plaintiff prays judgment against defendants as follows:

1. For a declaration that defendants were obliged to send their notice of default to Plaintiff at his true address, known to them.
2. For a declaration that any and all notices of default mailed to Plaintiff at any address other than his true address, known to defendants are null and void and of no legal effect.
3. For such other and further relief as to the Court may seem proper.

(s) GEORGE A. LYDON
Attorney for Plaintiff

September 17, 1973

APPENDIX G

Restatement of Judgments 2d.
Tentative Draft No. 1 (1973)

Section 76.

When a plaintiff seeks solely declaratory relief, the weight of authority does not view him as seeking to enforce a claim against the defendant. Instead, he is seen as merely seeking a judicial declaration as to the existence and nature of a relation between himself and the defendant. The effect of such a declaration, under this approach, is not to merge a claim in the judgment or to bar it. Accordingly, regardless of outcome, the plaintiff or defendant may pursue further declaratory or injunctive relief in a subsequent action.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1779

ROBERT L. CHAZIN,

Petitioner,

vs.

CARL WITKOVICH, W. F. OSTRANDER, TWIN PINES FEDERAL SAVINGS AND LOAN ASSOCIATION, and T. D. SERVICE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondents in Opposition

J. KENNY LEWIS
ROBERT CHARTOFF
115 Sansome Street
San Francisco, CA 94114
Counsel for Respondents

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

INDEX

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1779

ROBERT L. CHAZIN,

Petitioner,

vs.

CARL WITKOVICH, W. F. OSTRANDER,
TWIN PINES FEDERAL SAVINGS AND LOAN ASSOCIATION,
and T. D. SERVICE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief for Respondents in Opposition

OPINIONS BELOW

The opinions of both the District Court (App. "B" of Petition) and the Court of Appeals (App. "A" of Petition) are unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the District Court and the Court of Appeals properly interpreted California's rules of res judicata in holding that petitioner's federal action (the case at bar) was precluded by the judgment in his prior state court proceeding involving the same matter.[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

No constitutional provisions are involved in connection with the one question properly raised by the Petition.

Of the several statutory provisions cited by petitioner, the only pertinent one is California's Declaratory Judgment Act, California Code of Civil Procedure §§ 1060, 1062. The provisions of this statute are set forth in Appendix "D" of the Petition, at 27-28. California's Mortgage Foreclosure Law, Civil Code §§ 2924, 2924b, is relevant only to an understanding of the underlying factual context of this litigation, and has no substantive bearing herein. Its provisions are also set forth in Appendix "D" of the Petition, at 24-27.

---

1. The Petition also purports to raise the question of whether petitioner was provided with notice of respondents' intention to foreclose upon real property in accordance with the due process requirements set forth by this Court in Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950). *See* Petition, Questions Presented, Nos. 3 and 4, at 2. Inclusion of this issue as a question presented, however, seriously misrepresents the true nature of the Petition, for there are no circumstances under which this question would come before this Court pursuant to this Petition given the present posture of the litigation. See *infra* at 13-14 for a full discussion of this point.

STATEMENT

This litigation concerns the res judicata effect to be accorded a California state court judgment in a subsequent federal court proceeding involving the same matter. The transaction which underlies both the state and federal proceedings is a foreclosure on real property by respondent Twin Pines Federal Savings and Loan Association ("Twin Pines")[2] following repeated, undisputed failures by petitioner to fulfill his monthly payment obligations.

In 1970 petitioner purchased certain real property pursuant to a loan provided by Twin Pines. From almost the inception of this loan petitioner was repeatedly in default on his monthly payment obligations. Finally, in June 1973, after months of continually having to track down petitioner's whereabouts in order to make requests—which went unheeded—for monies long overdue, Twin Pines could no longer avoid formally declaring petitioner's loan to be in default. This action was taken on June 12, 1973, and constituted the second time in less than a year that Twin Pines was forced to take such measures in connection with petitioner's loan.[3]

---

2. Twin Pines is related to the Consumers Cooperative of Berkeley, Inc., and is a federally-chartered mutual savings and loan association. Twin Pines is organized and operated according to cooperative principles, and follows a more consumer-oriented approach in its lending transactions than most other lenders.

3. Petitioner's loan was first declared in default by Twin Pines nine months previous to the default which is the basis for the present litigation. This prior default, however, which involved tax and principal arrearages extending over a five-month period, was vacated by Twin Pines as a matter of grace following petitioner's tender, on February 1, 1973, of a portion of the monies due. Petitioner, however, subsequently failed to make further payments toward the remaining arrearages, which involved over $2,000 in delinquent taxes, as had been agreed when the default was vacated. Nor did petitioner make any payments toward interest and principal after March 1973.

The declaration of default was accomplished in accordance with the provisions of Sections 2924 and 2924b of the California Civil Code. Thus, on June 12, 1973, Twin Pines filed a notice of default and intention to foreclose with the county recorder of the county in which the property was located, and within the required ten days thereafter, on June 18, 1973,[4] advised petitioner of this filing by registered mail at the address previously specified by petitioner and filed with the county recorder. This was not the address of the property subject to foreclosure, but the address specified by petitioner as the one at which he wished to receive notice of any default.[5]

Under Section 2924c of the California Civil Code, petitioner had three months from the date when the notice of default was recorded in which to reinstate the loan by making an appropriate tender of all sums due. Although petitioner had at least 60 days' actual notice of the recording of the default, no such tender of all sums due was made before *or at any time after* the expiration of this three-month period.[6]

---

4. The Petition erroneously states that this notice was mailed on July 18, 1973. *See* Petition at 3. Petitioner's statement of the facts is riddled with other errors of this type, but this is the only one noted by Twin Pines which seriously distorts the facts.

5. Had petitioner wished to alter the address which he specified for the receipt of notice of default, he could readily have done so pursuant to a simple procedure provided for under California law. Petitioner was well aware of this procedure, and even filed a request for notice of default pursuant thereto. This request was separate and independent from the request contained in the deed of trust involved herein. Both of these requests required that notice be sent to the same address, which, accordingly, was the address relied upon by Twin Pines herein.

6. The suggestion in the Petition that a "full tender" was made by petitioner after the expiration of the three-month period, and that this tender was refused by Twin Pines (see Petition at 4), is a gross and unconscionable distortion of the record. Until the property was finally sold, which because of a preliminary injunction obtained by petitioner, was not until November 8, 1974, Twin Pines at all times stood ready to reinstate petitioner's loan upon payment of all sums legally due. Petitioner failed—and indeed refused—to make such a tender.

On September 12, 1973, at the expiration of the statutory redemption period, petitioner filed suit in the California state courts.[7] Petitioner's suit sought to enjoin sale of the property pending judicial consideration of his request for a declaratory judgment as to whether Twin Pines had provided him with appropriate notice of the pending foreclosure. Petitioner maintained that the notice of intended foreclosure was improper because it should have been mailed to him at the address of the property subject to the foreclosure, and not to the address he had filed with the county recorder.

The preliminary injunction requested by petitioner was granted, and a year later, following a trial on the merits, the Superior Court for Alameda County held against petitioner. After reviewing Twin Pines' several unsuccessful visits to the property in search of petitioner, as well as the return of mail addressed thereto, the state trial judge specifically held that "no [respondent] believed or reasonably should have believed at the time of the mailing of the Notice of Default that [petitioner] resided at or received mail at" the property subject to the foreclosure.

In addition, the state trial court also held that Twin Pines had provided petitioner with notice of the pending foreclosure in full compliance with the provisions of California law, which it was implicitly held established no precise notice period, but merely required that a party in default be given notice sufficient to provide a reasonable op-

---

7. Chazin v. Twin Pines Fed. Sav. & Loan Ass'n, No. 440595 (Alameda County Superior Ct.).

portunity in which to cure the default. Noting Twin Pines' concerted efforts over a three-month period to locate petitioner, as well as petitioner's "cavalier indifference" to keeping Twin Pines apprised of his whereabouts, the state trial judge readily concluded that under the circumstances, the statutory notice, along with the 60 days' actual notice provided to petitioner, was sufficient and timely notification of the foreclosure proceeding. Consequently, on September 25, 1974, the state trial court vacated its preliminary injunction, and permitted Twin Pines to proceed with the sale of the property.

Petitioner then sought to enjoin the sale by a series of petitions addressed to the California Court of Appeals, the California Supreme Court, and even Mr. Justice Douglas of this Court. Following the denial of each of these petitions, petitioner, on November 7, 1974, instituted a new injunctive proceeding in the United States District Court for the Northern District of California.[8] This is the proceeding which is now before this Court for review.

In this federal proceeding petitioner sought to relitigate the factual findings of the state trial court. Petitioner again claimed that the notice provided to him by Twin Pines was improper because it had not been mailed to the property subject to the foreclosure. This was the only issue raised by petitioner, and was identical to the one presented and decided in the previous Superior Court proceeding. This time, however, petitioner vigorously maintained that the failure to send notice to the property subject to the foreclosure constituted a violation of certain due process rights.

The District Court promptly denied the requested injunctive relief, and soon thereafter, on January 27, 1975, granted Twin Pines' motion for summary judgment on the ground that the federal proceeding was precluded by the

8. Chazin v. Witkovich, No. C74-2374 (N.D. Cal).

prior state court judgment under the rules of res judicata. On December 2, 1976, this determination was unanimously upheld by the Ninth Circuit Court of Appeals. Although it principally relied upon application of the state rules of res judicata, the Court of Appeals also noted an alternative and independent ground for its decision. Specifically, the Court of Appeals held that even if petitioner's constitutional claim were for some reason found to be litigable, it would nonetheless be defeated on the merits because of the collateral estoppel effect of the state trial court's finding that petitioner had actual, timely notice of the default.

Following the dismissal of petitioner's federal action by the District Court, petitioner then proceeded to appeal the Superior Court ruling through the California state court system. The notice issue, including the constitutional due process argument, was presented to the California Court of Appeals, and was rejected on November 17, 1975.[9] This constitutional issue was thereafter presented to the California Supreme Court, which deemed it an insufficient basis for granting a hearing on January 14, 1976.[10] Suprisingly, given petitioner's obvious penchant for the full use of every legal process available to him, certiorari was not sought from this Court with respect to this final state court disposition of his purported constitutional claim.

ARGUMENT

When stripped of its inaccuracies and irrelevancies, this Petition is readily exposed as being a legally misguided attempt by a disgruntled litigant to have this Court review factual and legal conclusions rendered by a state trial court in a separate but related prior proceeding in which cer-

9. Chazin v. Twin Pines Fed. Sav. & Loan Ass'n, 1 Civ. 36434 (Ct. App.), Appellant's Opening Brief at 20.

10. Chazin v. Twin Pines Fed. Sav. & Loan Ass'n, *supra*, Petition for Hearing [in the Supreme Court of California] at 9.

tiorari was not sought. A petition of this kind is certainly not one warranting acceptance by this Court.

This Petition emanates from a determination by the Court of Appeals that petitioner's federal action (the case at bar) was precluded by the judgment in his prior state court proceeding involving the same matter. Under the command of the statutory full faith and credit clause,[11] as well as prior decisions of this Court,[12] and at the urging of both petitioner and respondents herein,[13] the Court of Appeals relied upon California's state law of res judicata in order to determine the preclusive effect of the prior state court judgment. The only issue presented by the Petition, therefore, is whether the Court of Appeals properly interpreted California's state law of res judicata as barring petitioner's attempt at relitigating the merits of his claims.

Certiorari is obviously inappropriate in this case. The Court of Appeals decision is supported by the statutory and case law of the State of California, and is clearly correct. Moreover, the decision below, being no more than a determination of state law, necessarily raises no conflict of decision within the federal judicial system, or any pending question of federal law requiring review by this Court. The Petition should therefore unquestionably be denied.

I. The Decision Below Is Clearly Correct.

The correctness of the decision below turns on the proper res judicata effect to be accorded a California state court

11. 28 U.S.C. § 1738 (1970), which provides in pertinent part: [J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

12. *See, e.g.*, American Sur. Co. v. Baldwin, 287 U.S. 156, 165-67 (1932).

13. *See* Petition at 8; Appellee's Opening Brief at 6-8.

judgment rendered in an action for declaratory relief. Contrary to the assertions of petitioner,[14] there is no lack of California authority on this issue. Nor is there any doubt that the Court of Appeals correctly applied this authority to bar petitioner's federal action.[15]

The only distinction between the state and federal actions involved herein is that, in the federal action, petitioner has attempted to pursue a different legal theory than that presented to the state trial court. Petitioner's newly-urged theory is that the notice provided by Twin Pines was in violation of his right to due process. It is undisputed between the parties that ordinarily such a theory would be barred by application of the rules of res judicata. Under California law a party must assert all legal theories in one action, and is not permitted, under application of the rules of res judicata, to attempt to relitigate the same issues in different actions on different legal theories. The statement of California law is set forth in *Lortz v. Connell,* 273 Cal.App.2d 286, 297 (1969):

> As noted in *Sutphin v. Speik, supra* [15 Cal.2d 195, 201-2], ". . . the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, that judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters

14. *See* Petition at 10.

15. Petitioner inexplicably contends that the Court of Appeals failed to apply California state law in order to determine the res judicata effect of the prior state court judgment. *See* Petition at 9. The Court of Appeals decision, however, clearly rests upon and specifically refers to the two California state cases to be discussed herein. *See* Petition, Appendix "A," at 20.

which were raised or could have been raised, on matters litigated or litigable." [emphasis in original]

Petitioner, however, maintains that the usual rules of res judicata do not apply to his peculiar case because the state court action was brought under California Code of Civil Procedure Section 1060, *et seq.* (and, in particular, Section 1062). Specifically, petitioner claims that California Code of Civil Procedure Section 1062 abolishes application of the rules of res judicata to actions brought in the California state courts for declaratory relief. In support of his argument, petitioner cites the case of *Lortz v. Connell, supra.*

Contrary to petitioner's reading, *Lortz* does not stand for the proposition that res judicata has no application to actions tried in declaratory relief. Instead, *Lortz* merely construes Section 1062 to permit a limited exception to res judicata. *Lortz* held that under Section 1062, a party may seek remedies in addition to declaratory relief subsequent to the action for declaratory relief where that party is entitled to *additional relief* based upon the same facts. Specifically, the Court said:

> Consequential or incidental relief may be obtained in an action in which a declaratory judgment is sought, but the failure to seek such relief in such action or suit does not constitute a bar to other proceedings to *enforce the rights determined by the judgment,* whether such other proceeding is by petition filed in the declaratory action or in a separate and independent suit or action subsequently filed, *but predicated, however, upon the declaration of rights contained in the declaratory judgment.* [emphasis supplied]

273 Cal.App.2d at 300. Quoted with approval in *Southern Counties Gas Co. v. Ventura Pipeline Construction Co.,* 19 Cal.App.3d 372, 382 (1971).

The Court continues to state:

> The salutary purpose of the declaratory relief provisions is to permit a prompt adjudication of the respective rights and obligations of the parties in order to relieve them from uncertainty and insecurity with respect to rights, status, and other legal relations [citation]. The general rule referred to above, which does not bar the right to subsequent coercive action, promotes this purpose. It enables a party to get a prompt adjudication without a dispute over the damages suffered. In many cases further proceedings will be unnecessary because the right of the party who might claim damages is not established, or because if his right is established no damages ensue, or, if ensuing, damages may be established without further litigation.

273 Cal.App.2d at 301.

It is apparent from the language of the Court in *Lortz* that Section 1062 allows a party to avoid the bar of res judicata in the event that he obtains a declaration in favor of his rights and wishes to pursue further remedies based upon such declaration. On the other hand, Section 1062 has never been applied to permit parties to litigate issues under a request for declaratory relief, obtain a declaration to the effect that they have no rights, and then relitigate the same issue based on a different legal theory. To the contrary, the specific statement of California law for such a set of facts is in *Dills v. Delira Corp.,* 145 Cal.App.2d 124, 130-31 (1956), where the Court states:

> It is true that Code of Civil Procedure, Section 1062, provides that "no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts." However, that language provides merely that when one obtains a declaration, he has not thereby forfeited his right to obtain coercive relief. It certainly was not intended to allow a litigant

who is determined not to have any rights to relitigate his claim in quest of different relief.

The statement in *Dills* is precisely the factual situation presented by the Petition herein. Petitioner litigated his claim in state court, maintaining he had been given improper notice by Twin Pines. Such issue was determined adversely to petitioner, and such determination was upheld on appeal through the Court of Appeals and the Supreme Court of the state. Seeking a redetermination of this very issue, petitioner now appears in federal court seeking declaratory relief and damages claiming the same defect of notice. California Code of Civil Procedure Section 1062 does not change the overwhelming body of law that denies the opportunity to relitigate the same claim in a different forum.

The foregoing statement of the California rules of res judicata, as applied to a declaratory judgment, was presented to the Court of Appeals and specifically adopted in its decision. *See* Petition, Appendix "A," at 20. Adoption of this statement of California law was the considered judgment of three judges who are constantly required to pass upon California law questions, one of whom has long been a resident and lawyer of California. It was also the judgment of the District Court. This is clearly the kind of determination of local law that is ordinarily accepted by this Court, and ought not to be disturbed. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 674 (1950); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949).[16]

16. *See also* Spiegel's Estate v Commissioner, 335 U.S. 701 (1949), where it was held that even where reasonable arguments could be made on both sides of a question of state law (which of course is not the case here), this Court will follow its general policy and leave undisturbed the Court of Appeals holding on a question of state law.

II. There Is No Pending Question of Federal Law.

The principal question of federal law which the Petition purports to raise is whether petitioner was provided with notice of Twin Pines' intention to foreclose upon real property in accordance with the due process requirements set forth by this Court in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). *See* Petition, Questions Presented, Nos. 3 and 4, at 2. As has been noted previously, however, assertion of this question at this time seriously misrepresents the true nature of the Petition, for there are no circumstances under which this question would come before this Court pursuant to this Petition given the present posture of the litigation.

The case at bar comes to this Court on the procedural question of whether the Ninth Circuit Court of Appeals properly interpreted California's rules of res judicata. Even were this Court to review, and subsequently overturn, this determination of state law, which is most unlikely, the due process question under *Mullane* would still not be reached. Determination of this question requires two detailed factual inquiries: First, whether the state is sufficiently involved in the foreclosure proceeding to require the application of the due process clause, and if so, whether the notice provided was, under the particular circumstances of this case, reasonably calculated to apprise petitioner of the pendency of the foreclosure proceeding. In light of the summary dispositions below, however, the record is devoid of the facts necessary to determine these questions, especially given the unique factual context of petitioner's case. Thus this Court would be unable to decide these questions pursuant to the Petition filed herein, and would have no recourse other than to remand this case to the lower courts for appropriate findings of fact and resultant

conclusions of law. *See Planned Parenthood of Missouri v. Danforth,* 428 U.S. 52, 63, n.2 (1976); *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); *Calmar Steamship Corp. v. U.S.,* 345 U.S. 446 (1953).

The Petition also contains several misleading suggestions that other federal constitutional questions are involved besides the due process claim under *Mullane.* None of these so-called due process and equal protection claims was ever raised below, and their assertion constitutes a vivid example of petitioner's strained attempts to make his case appear to be something more than an attempt to relitigate issues previously decided in the state courts. Moreover, for the same reasons set forth above in connection with the alleged claim under *Mullane,* these purported claims are premature. That they are frivolous, not to mention abstract and hypothetical, goes without saying given the factual context of petitioner's case. They certainly provide no basis for granting certiorari.

III. There Is No Conflict of Decision.

In another apparent effort to make this Petition appear to have some merit, petitioner literally tosses out the suggestion that the res judicata effect of a prior state court judgment in a subsequent action under 42 U.S.C. § 1983 is the subject of conflicting decisions of the Courts of Appeals. *See* Petition at 8.

At the risk of giving this off-hand remark more attention than it is due, respondents wish merely to point out that petitioner has throughout this litigation consistently sought to have state rules of res judicata applied in determining the res judicata effect of the prior state court judgment. At no time has petitioner heretofore suggested, as he apparently does by citing *Lombard v. Board of Education*

502 F.2d 631 (2d Cir. 1974), that Section 1983 actions override the command of statutory full faith and credit. Obviously, this argument is belatedly raised now merely to confuse and complicate this matter, and make it appear to be that which it is not.

Moreover, this argument is without merit. *Lombard* is an aberrational decision which stands alone among the circuits.[17] It has either been criticized as wrongly decided[18] or has been rationalized by severely limiting it to its particular facts,[19] which are not duplicated herein. Though apparently sometimes relied upon as a basis for seeking certiorari, such petitions have routinely been denied by this Court.[20] In essence, therefore, *Lombard* has been sufficiently discredited or limited so as not to give rise to any conflict of importance, and constitutes no valid basis for seeking certiorari.

---

17. *See* Fortune v. Mulherrin, 533 F.2d 21 (1st Cir. 1976); Roy v. Jones, 484 F.2d 96 (3d Cir. 1973); Davis v. Towe, 526 F.2d 588 (4th Cir. 1975); Jennings v. Caddo Parish School Bd., 531 F.2d 1331 (5th Cir. 1976); Coogan v. Cincinnati Bar Ass'n, 431 F.2d 1209 (6th Cir. 1970); Blankner v. City of Chicago, 504 F.2d 1037 (7th Cir. 1974); Chasteen v. Trans World Airlines, Inc., 520 F.2d 714 (8th Cir. 1975); Scoggin v. Schrunk, 522 F.2d 436 (9th Cir. 1975); Spence v. Latting, 512 F.2d 93 (10th Cir. 1975). *Cf.* Preiser v. Rodriguez, 411 U.S. 475, 497 (1973).

18. Note, 88 HARV. L. REV. 453 (1974).

19. McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II,* 60 VA.L. REV. 250, 276-277 (1974).

20. *See* Burns v. Decker, *cert. denied,* 423 U.S. 1017 (1975), *pet. reh. denied,* 423 U.S. 1081 (1976); First American Bank & Trust Co. v. Ellwein, *cert. denied,* 423 U.S. 1055 (1976).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted

J. KENNY LEWIS
ROBERT CHARTOFF
Counsel for Respondents

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1779

ROBERT L. CHAZIN,
Petitioner,

vs.

CARL WITKOVICH, W. F. OSTRANDER, TWIN PINES FEDERAL SAVINGS AND LOAN ASSOCIATION AND T. D. SERVICE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner's Reply Brief

ROBERT L. CHAZIN
1760 Solano Avenue, Suite 200
Berkeley, California 94705
Petitioner Pro Se.

MILTON NASON
GEORGE A. LYDON
1760 Solano Avenue, Suite 200
Berkeley, California 94707
Telephone: [415] 526-4730
Of Counsel.

Printer: Copy-Copia, San Francisco, California Phone [415] 391-0574
Typesetter: Graphitype, Berkeley, California. Phone [415] 526-7151

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Treatises

Law Review Articles

Cases

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1779

ROBERT L. CHAZIN,
Petitioner

vs.

CARL WITKOVICH, W. F. OSTRANDER, TWIN PINES FEDERAL SAVINGS AND LOAN ASSOCIATION AND T. D. SERVICE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner's Reply Brief

Petitioner replies to the Brief of Respondents, filed on or about October 28, 1977.

I.

This Court Has Never Determined the Res Judicata Effect of a Prior State Court Judgment in Subsequent Section 1983 Litigation

Respondents assert that "In another apparent effort to make this Petition appear to have some merit, petitioner literally tosses out the suggestion that the res judicata effect of a prior state court judgment in a subsequent action under 42 U.S.C. § 1983 is the subject of conflicting decisions of the Court of

Appeals. See Petition at 8. . . . At no time has petitioner heretofore suggested, as he apparently does by citing *Lombard v. Board of Education*, 502 F. 2d. 631 (2d cir., 1974) that section 1983 actions override the command of statutory full faith and credit . . ." Respondents are incorrect. A suggestion that there is a conflict in decisions of the Courts of Appeals, and the reference to the *Lombard* case appears, for instance, on page 9 of Petitioner's opening brief in the Court of Appeals.

Respondents substantive assertion that there is, in fact, no conflict, and the implication that the law is settled in this area, is also inaccurate. In *Getty v. Reed*, 547 F. 2d 971 (6th cir., 1976), the Court (per Edwards, Circuit Judge) considered this question and said, in reversing a district court judgment:

> "If what we have said thus far suggests that the District Judge who held he had "no jurisdiction" to try this case simply missed the signs on a well marked trail, we hasten to acknowledge that no such thing is true. One commentator, Theis, has noted that the Supreme Court has given no guidance as to claim preclusion by final state court decision in §1983 cases and added that as a result "the decisions of the lower courts teem with inconsistencies." Theis appended the following footnote to illustrate his point:
>
> *Compare Thistlethwaite v. City of New York*, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 . . . (1974), *with Lombard v. Board of Educ.*, 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 . . . (1976); *Roy v. Jones*, 484 F.2d 96 (3d Cir. 1973), *with Kauffman v. Moss*, 420 F.2d 1270 (3d Cir.), *cert. denied*, 400 U.S. 846 . . . (1970); *Brown v. Chastain*, 416 F.2d 1012 (5th Cir. 1969), *with Mack v. Florida State Bd. of Dentistry*, 430 F.2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 960 . . . (1971) (White, J., dissenting from denial of writ); *Coogan v. Cincinnati Bar Ass'n*, 431 F.2d 1209 (6th Cir. 1970), *with Mulligan v. Schlacter* . . . , 389 F.2d 231 (6th Cir. 1968); *Blankner v. City of Chicago*, 504 F.2d 1037 (7th Cir. 1974), *with Hampton v. City of Chicago*, 484 F.2d 602, 606 n.4 (7th Cir. 1973); *Francisco Enterprises, Inc. v. Kirby*, 482 F.2d 481 (9th Cir. 1973), *cert. denied*, 415 U.S. 916 [94 S.Ct. 1413, 39 L.Ed.2d 471] (1974), *with Ney v. California*, 439 F.2d 1285 (9th Cir. 1971)."
>
> Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 Nw. U.L.Rev. 859, 865-66 & n. 35 (1976).

As pointed out in the Petition (at fn. 12, page 8), this Court has heretofore expressly declined to consider the question, which has been presented to it many times. *Huffman v. Pursue, Ltd.* 420 U.S. 592 (1975). And in *Preiser v. Rodriguez*, 411 U.S. 475, 509 (1973), Mr. Justice Brennan, in a dissenting opinion, observed:

> "In any case, we have never held that the doctrine of res judicata applies, in whole or in part, to bar relitigation under §1983, of questions that might have been raised, but were not, or that were raised and considered in state court proceedings. . . ."

In sum, far from being settled, the uncertainty of the law in this area continues to generate conflicting decisions in the district courts and courts of appeals and has resulted in a large number of law review articles.[1] *Theis, supra.*

It is clear that should this Court decide that state judgments on federal constitutional questions are not res judicata in subsequent section 1983 actions, such a decision would be dispositive of that issue here. It would also seem clear that while Petitoner did not directly raise that iddue in the petition, it is one which is a ". . . subsidiary question, fairly comprised . . ." in Questions 1 and 2 of the petition, at least with reference to the subsequent section 1983 action which underlies the instant petition, *cf.* Rule 23(1)(c).[2]

[1] "For an analysis of these and other cases, see Averitt, *Federal Section 1983 Actions After State Court Judgment*, 44 U.Colo.L.Rev. 191 (1972); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims. Part II*, 60 Va.L.Rev. 250 (1974) . . .; Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 Okla.L.Rev. 185 (1974); Note, *Relationship of Federal and State Courts*, 88 Harv.L.Rev. 453 (1974); Comment, *The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions*, 1975 U.Ill.L.F. 95 . . ." *Theis, supra.*

[2] Respondents brief implies that the question is settled and not deserving of consideration. In Petitoner's view, not only is the question unsettled, pending a decision in this Court, it is also one of far reaching consequences, involving as it does conflicting policy considerations relating to the "accessibility" of the federal courts, and pending Congressional legislation. (S.B. 35, 95th Congress.) For these reasons, though the question is mentioned both in Petitioner's opening brief in the Court of Appeals and in the instant Petition, the point was not stressed.

II.

Neither the *Dills* nor *Sutphin* Cases Support Respondents' Contention That a California Declaratory Judgment Is Res Judicata as to Matters Unlitigated or Undeclared

A. Respondents' Authorities

Respondents rely, as they did in the Court of Appeals, on *Dills v. Delira*, 145 Cal. App. 2d 124, 302 P. 2d. 397 (1956) and *Sutphin v. Speik*, 15 Cal. App. 2d 195, 99 P. 2d 652 (1940) to support their contention that a California declaratory judgment is subject to the principles of res judicata applicable to judgments in general. They do not, however, proffer authority contrary to that contained in the Petition at 10.[3]

Dills, as remarked in the Petition (fn. 22.5, page 11) is inapposite. *Dills*, in fact, did not involve the question of res judicata at all, for the *Dills* case involved a single action. In *Dills*, the plaintiff sought a declaration that he and the defendants were associated in a partnership, and certain other relief, including an accounting. The language quoted by Respondents from *Dills*, (Brief of Respondents, 11) was used by the *Dills* court in reference to a situation, where in *one* action, a plaintiff, having been found not to be a member of a partnership, was not entitled to an accounting for the profits thereof, and was not to be permitted to relitigate his claim, *in the same action,* for different relief, by reason of the language contained in section 1062 of the California Code of Civil Procedure. But whatever the import of this

[3] Respondents assert (R.B., page 10, part 2) that "Contrary to petitioner's reading, *Lortz* [*Lortz v. Connell*, 273 Cal. App. 2d 286, 78 Cal. Rptr. 6 (1969)] does not stand for the proposition that res judicata has no application to actions tried in declaratory relief." This was not, however, Petitioner's reading. Rather, Petitioner asserted that "[a] (declaratory judgment does not preclude prevailing party from seeking damages in subsequent action) . . ." As Respondents admit (R.B. page 10), this holding, in itself, is a ". . . limited exception to res judicata." *Lortz* is thus consistent with Petitioner's contentions as to the res judicata effect of a California declaratory judgment and inconsistent with Respondents' position thereon.

language, it is wholly inapplicable to the case at bar, involving as it does the preclusive effect of a prior judgment. In sum, in *Dills*, no question of res judicata, collateral estoppel, or similar doctrine of judicial finality was involved.

Similarly, *Sutphin v. Speik* has no application to the case at bar. *Sutphin* did involve two actions, and the opinion in the second action, reported at 15 Cal. 2d 195, 99 P. 2d 652 (1940), a portion of which is quoted by Respondents at page 9, sets forth the general rule of res judicata applicable to judgments in general. But the prior judgment in *Sutphin* was not a declaratory judgment. Rather, as can be seen by inspection of the opinion in the first *Sutphin* case, *Sutphin v. Speik* 15 Cal. App. 2d 516, 59 P. 2d 611 (1936), it was an action for damages.[4] The rule set forth in the second Sutphin case, and quoted by Respondents, is fully applicable to such actions. Petitioner's prior state action (Petition, App. F) sought no damages.

B. Review of Decisions of the Court of Appeals on Controlling Questions of State Law

Respondents contend that a determination of local law made by the Court of Appeals is ordinarily accepted by this Court, and ought not, therefore to be disturbed. (Brief of Respondents at 12). This is indeed the general rule. But this policy was never intended to preclude the Court from granting certiorari to reverse a judgment of the Court of Appeals on a question of state law where federal rights are affected. Indeed, Rule 19(b) of this

[4] Although it is clear from a reading of the first *Sutphin* case that the action therein sounded in damages, the precise nature of the complaint is not set forth in the opinion of the District Court of Appeal. Petitioner has consulted the California State Archives in Sacramento, where both cases are presently on file. The first *Sutphin* action involved a complaint for money had and received. (Los Angeles Superior Court No. 364746; Court of Appeal (2d dist.) No. 2-Civil-10053. The Court may be interested to know that the second action involved a complaint and supplemental complaint styled the same way. (California Supreme Court No. L.A. 17142.)

Petitioner asks that the Court take judicial notice of these facts.

Court specifically lists a situation where a ". . . court of appeals has decided an important state . . . question in a way in conflict with applicable state . . . law . . ." as among those justifying, in the Court's sound discretion, grant of the writ. Moreover, this Court has previously considered questions of state law when federally conferred rights were affected or involved, *cf. Brown v. Western Railway* 338 U.S. 294 (1949); on at least one occasion, it has even reversed a judgment of a state supreme court interpreting that state's constitution. *West Virginia ex rel. Dyer v. Sims* 341 U.S. 22 (1951).

C. Unsettled Questions of State Law Render an Action Suitable for Abstention

In Petitioner's view, Petitioner's position on the question of the preclusive effect of a California declaratory judgment is an accurate statement of California law. Should the Court feel that the question requires further elucidation, Petitioner urges, as he did in the Court of Appeals, that the appropriate course of action is reversal, remanding the cause to the District Court, with directions to retain jurisdiction and to abstain while the questions of state law are litigated in state court, as was done in the *Garfinkle* case (Petition at 6.)[5] See *Carey v. Sugar*, 425 U.S. 73 (1976).

This, Petitioner suggests, is preferable to an affirmance of the judgment of dismissal which operates to deprive Petitioner of his right to a federal adjudication of federal constitutional questions, *cf. England v. Louisiana Board of Medical Examiners* 375 U.S. 411 (1964).

[5] *Garfinkle v. Wells Fargo Bank*, 483 F. 2d 1074 (9th cir., 1973). The California Supreme Court has ordered a hearing in the subsequent Garfinkle case to decide questions of state action and due process similar to those presented by questions 3 and 4 of the instant petition. Petitioner has filed a motion in this Court, requesting that consideration of the instant petition be deferred pending the decision in that case.

III.
The Disposition of Petitioner's Prior State Court Proceeding in the State Appellate Courts Does Not Render the Judgment Therein Res Judicata as to the Constitutional Questions Presented Here.

Respondents now contend, *for the first time*, that the disposition of Petitioner's prior state court proceedings in the state appellate courts is an additional and further ground for the assertion that the judgment is res judicata on the constitutional questions presented here and in the Court of Appeals. Brief of Respondents at 7.

Respondents had the opportunity to present this particular claim to the Court of Appeals and did not do so. They are, accordingly, precluded from presenting it here. *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967).

Consideration of this assertion on the merits does not compel a different result. Under California law, it is well settled that summary denials of petitions for hearing by the California Supreme Court are not res judicata for any purpose. *People v. Davis*, 147 Cal. 346, 81 P. 718 (1905).

Nor does the fact that the issue of due process (but not state action) was briefly mentioned in Petitioner's brief, filed in the state Court of Appeal render the judgment of the superior court res judicata on the constitutional questions.[6] As can be seen by inspection of the superior court complaint (Petition, App. F), no constitutional issues were presented therein. The constitutional question was therefore unnecessary to the disposition of the appeal and, indeed, the Court of Appeal was free to ignore it. Under such circumstances, such a point raised on appeal does not, via the doctrine of collateral estoppel,[7] preclude subsequent

[6] Petitioner was represented by counsel in the state appellate court and did not participate in the preparation of the brief. Respondents filed no brief.

[7] Petitioner contended in the Court of Appeals that the state and federal actions involved two distinct causes of action rather than one, so that the applicable doctrine was collateral estoppel, rather than res judicata. See Petitioner's Opening Brief therein at 11; Respondents never controverted this assertion. The two causes of action were asserted to be based upon the recording of the notice of default on or about June 18, 1973 and the subsequent foreclosure sale on November 8, 1974.

litigation of the issue or become part of the law of the case. This has been the law for many, many years. *Fulton v. Hanlow*, 20 Cal. 450, 483 (1862); *Gyerman v. U.S. Lines*, 7 Cal. 3d. 488, 102 Cal. Rptr. 795, 498 P. 2d. 1043 (1972). Accordingly, an unqualified affirmance by the state Court of Appeal of a judgment below could neither expand nor contract the scope of that judgment.

Finally, and most importantly, California has adopted section 70 of the Restatement of Judgments, which provides:

> "Where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is *not* conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same matter or transaction; and in any event, it is not conclusive if injustice would result." (Emphasis added.)

Louis Stores, Inc., v. Department of Alcoholic Beverage Control, 57 Cal. 2d 749, 22 Cal. Rptr. 14, 371 P. 2d. 758 (1962); *Thain v. City of Palo Alto*, 207 Cal. App. 2d 173, 24 Cal. Rptr. 515 (1962).

IV.

The Record Is More than Sufficient to Permit Adjudication of the Constitutional Questions In This Court or on Remand

Respondents now contend that ". . . there are *no* circumstances under which [the questions of state action and due process] would come before this Court . . ." and that ". . . in light of the summary disposition below, however, the record is devoid of facts necessary to determine these questions, especially given the unique factual context of petitioner's case." Brief of Respondents at 13.

Petitioner cannot agree. The res judicata issue may be determined adversely to Respondents on any of several grounds, in this Court or in a lower court, after abstention is invoked and a ruling on the question is secured following appropriate state

court proceedings. At any point where it might be determined that the prior state court judgment is not res judicata as to the constitutional questions, such questions could then be adjudicated, either in this Court or in a lower federal court.

Nor is there anything "unique" in the facts of Petitioner's case, for, as a perusal of the California reported cases will show,[8] non-judicial foreclosures where the homeowner does not receive notice, and no notice is directed to the property sought to be foreclosed are quite common.[9]

As to the adequacy of the record, Petitioner reiterates once again that there are sufficient facts on the existing record in the District Court, or in the record in the state court of which this Court may take judicial notice, to adequately adjudicate the constitutional questions. The issue of state action is purely legal and involves an analysis of the relevant state statutes, state decisional law, and the procedures used by state and local officials in implementing the statute. A least in this case, additional facts are not necessary to a consideration of the state action question. In Petitioner's view, this is also true of the facts needed to decide, should the requisite state action be found, whether or not Petitioner was accorded notice consonant with the requirements of due process. In any event, should the Court find the record, supplemented by matters of which the Court can take judicial notice, inadequate, there are ample procedural devices for developing such additional facts as might be required, including, as Respondents suggest, remand to the District Court for additional findings.

V.

Factual Allegations Contained in Respondents Brief Which Are Erroneous, Irrelevant or Outside the Record Should Be Stricken

Respondents' brief contains numerous factual allegations which are dehors the record, erroneous, and in any event,

[8] See J. Hetland, *Secured Real Estate Transactions*, California Continuing Education of the Bar, 1974 (especially Ch. 8).

[9] See, e.g., *Lupertino v. Carbahal*, 239 Cal. App. 2d 605, 111 Cal. Rptr. 112 (1974).

irrelevant to the questions presented by the petition. Most of these allegations are being raised in Respondents' brief for the first time.[10] There were no factual disputes in the District Court or in the Court of Appeals.[11]

A complete, detailed, item by item examination of these factual allegations would be an imposition upon the Court's time. Moreover, Petitioner does not wish to distract the Court from the constitutional questions presented by the Petition, particularly in view of the fact that the factual allegations made by Respondents are irrelevant to those questions.

Accordingly, Petitioner replies to those assertions made by Respondents which appear to be particularly egregious in Appendix A. In so doing, Petitioner does not, of course, admit the validity of the remainder. Furthermore, since the factual allegations taken together amount to an unjustified personal attack on Petitioner, Petitioner and the attorneys of counsel herein request that they be stricken pursuant to Rule 40(5).

CONCLUSION

Respondents have presented no valid authority supporting their contention that the prior state court judgment is res judicata as to the substantial contitutional questions presented below. The Court has already granted certiorari this term to consider whether the foreclosure of certain warehousement's liens constitutes state action;[12] the question of state action presented by the instant petition is of like or greater public

[10] Respondents filed no brief in response to the Petition until, on September 14, 1977, the Clerk, acting on instructions from the Court, requested them to do so.

[11] The proceedings in the District Court were had pursuant to Respondents' motion for summary judgment. Even if such factual disputes had existed, all matters presented in connection with Respondents' motion would have been construed most favorably to Petitioner. Rule 56, F. R. Civ. P.; *U.S. v. Diebold*, 369 U.S. 654 (1962).

[12] *Flagg Bros. v. Brooks* (No. 77-25); *Lefkowitz v. Brooks* (No. 77-37); *American Warehousemen's v. Brooks*, (No. 77-42), 46 U.S.L.W. 3215.

importance. The writ should be granted under circumstances permitting the parties to submit briefs after the California Supreme Court has ruled on *Garfinkle* and its companion cases. Alternatively, should the Court feel that further clarification of the question of res judicata be necessary, the judgment below should be vacated, and the cause remanded to the District Court with directions to retain jurisdiction and abstain while the state law questions are litigated in state court, Petitioner being permitted to return to the District Court to litigate the constitutional questions in the event of a determination of the state law questions in his favor.

DATED: November 8, 1977

Respectfully submitted,

ROBERT L. CHAZIN
1760 Solano Avenue, Suite 200
Berkeley, California 94707
Petitioner Pro Se.

MILTON NASON
GEORGE A. LYDON
1760 Solano Avenue, Suite 200
Berkeley, California 94707
Telephone: [415] 526-4730
Of Counsel.

APPENDIX A

Petitioner's Reply to Respondents' Factual Allegations

Page references, unless otherwise indicated, are to Respondent's Brief.

1. On page 4, Respondents allege that ". . . no such tender was made before or at any time after the expiration of this three month period." (Emphasis in the original.) Petitioner asks this Court to take judicial notice of the Reporter's Transcript at the trial in the prior state court proceedings, commencing at page 34, line 24, thereof. There, Respondent Ostrander testified as follows:

"Q. [By Petitioner's attorney, George Lydon]: Do you recall a tender of payment of some $4,000 being made to Twin Pines in the autumn of 1973? A. Yes, I do."

While Respondents ultimately rejected the tender as being insufficient in amount, and litigation commenced because Petitioner refused to pay the additional amounts demanded by Respondent Twin Pines, Twin Pines has never before, either in the lower federal courts, or in the prior state court proceeding, denied receiving the tender at all. The statement in Respondents' brief is thus incorrect.

2. On page 4, of Respondents' Brief at footnote 4, Respondents assert that "The Petition erroneously states that this notice was mailed on July 18, 1973 . . ." and then label this as "a serious distortion of the facts." The date cited is indeed incorrect, as Respondents claim; but the correct date, June 18, appears in the Superior Court complaint, appended to the Petition as Appendix F, and elsewhere in the petition. As set forth in the opinion of the Court of Appeals, Petitioner did not have actual notice of the impending foreclosure until July 17, 1973. It is quite clear from the context in which the erroneous date occurs, that the erroneous date was inadvertent.

3. On page 4, footnote 5, Respondents assert that Petitioner was "well aware" of the California request for notice procedure.[1]

[1] A description of the California request for notice procedure, mandated by section 2924b of the California Civil Code, can be found in *Hetland, supra*, at 144-145; 158-161.

In support of this contention, they assert that Petitioner has filed several such requests for notice distinct from those contained in the deed of trust involved in this litigation.[2]

In actual fact, Petitioner was unaware of the request for notice procedure referred to by Respondents and described in the footnote. Respondents, who have advised the Court of the existence of the requests for notice recorded by Petitioner have neglected to inform the Court that these notices were recorded on October 26, 1973, several months *after* the foreclosure proceedings and Superior Court action had been commenced. These requests, which are found at Reel 3541, Images 122, 123, and 124 of the Alameda County Recorder's records were recorded by Petitioner on instructions from his attorney, George A. Lydon and were intended to keep him informed of subsequent events affecting the property.

4. On page 6, Respondents contend that in the proceedings in the District Court, ". . . Petitioner attempted to relitigate the factual findings of the state trial court . . ." This is incorrect. As an examination of the record shows, both the complaint and amended complaint therein dealt with the constitutional questions alone. As set forth at 13, *supra*, there were no factual disputes in the federal trial or appellate courts.

Respondents' brief contains other misstatements of fact, particularly on page 3 thereof, but, for the reasons previously set forth, Petitioner does not, at this time advert to them. Petitioner will, of course, supply any factual material the Court may desire.

[2] Section 2924b is set out in the Petition, App. D. Standard California deeds of trust may or may not have a request for notice contained therein. Petitioner has heretofore requested the Clerk of the Court of Appeals to transmit a copy of the deed of trust in this case to the Court as an exhibit pursuant to Rule 21(1).